No. PD-0008-22

In the Court of Criminal Appeals of Texas

Maxie D. Green d/b/a A to Z Bail Bonds,
Appellant

v.

The State of Texas,
Appellee

On review from the Second Court of Appeals, No. 02-21-00013-CV
On appeal from the 30th District Court of Wichita County, No. 190,340-A

The State's Brief

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IDENTITY OF JUDGE, PARTIES, AND COUNSEL

Under Texas Rules of Appellate Procedure 38.1(a) and 70.3, the State provides the following information.

- The parties to the trial court's judgment are the State of Texas and Appellant Maxie D. Green d/b/a A to Z Bail Bonds.

- The trial judge is the Hon. Jeff McKnight, the presiding judge of the 30th District Court of Wichita County.

- Counsel for Appellant in the trial court and on appeal is Mark Barber. Mr. Barber's address is Mark H. Barber, 900 8th St., Ste. 1006, Wichita Falls, TX 76301.

- Counsel for the State in the trial court was Tracey L. Jennings, an attorney practicing within the Wichita County District Attorney's Office. The attorneys for the State on appeal to the Second Court of Appeals were Demetri Anastasiadis and Bryce Perry, attorneys practicing within the Wichita County District Attorney's Office. Counsel for the State in this Honorable Court is Bryce Perry. The address of the Wichita County District Attorney's Office is 900 7th Street, Rm. 352, Wichita Falls, TX 76301.

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Statutes

Rules

Cases

STATEMENT OF THE CASE

After a felony defendant failed to appear for a pretrial conference, the trial court signed a judgment nisi that provisionally forfeited the bond that she and her surety, Appellant Maxie D. Green d/b/a A to Z Bail Bonds, had executed. C.R. 4, 1 Supp. C.R. 25. The State sought summary judgment against Appellant (the bondsman) on the basis of undisputed proof (among other unchallenged facts) that on the day of the pretrial hearing, the defendant's name had been "distinctly called at the courtroom door." 1 Supp. C.R. 15, 18, 43.

The trial court granted summary judgment. C.R. 23. A panel of the Second Court of Appeals reversed the trial court's judgment while concluding that proof of the calling of a defendant's name at a "courtroom door" is insufficient, in a summary-judgment context, to meet the "courthouse door" requirement of article 22.02 of the Texas Code of Criminal Procedure.[1] The State filed a motion for rehearing and a motion for en banc reconsideration, and the Second Court denied those motions. The Honorable Mike Wallach, who was not on the original three-justice panel, voted to grant the State's motion for en banc reconsideration.

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[1] *Green v. State*, No. 02-21-00013-CV, 2021 WL 5747148, at *4–5 (Tex. App.—Fort Worth Dec. 2, 2021, pet. granted) (mem. op., not designated for publication); *see* Tex. Code Crim. Proc. Ann. art. 22.02 ("Bail bonds . . . are forfeited in the following manner: The name of the defendant shall be called distinctly at the courthouse door, and if the defendant does not appear within a reasonable time after such call is made, judgment shall be entered . . . .").

ISSUE PRESENTED

I. In an appeal from a bond-forfeiture judgment, the Second Court of Appeals drew a determinative distinction between the calling of a defendant's name at a "court*room* door" instead of a "court*house* door." The Second Court's decision conflicts with every other Texas appellate decision rendered on the same issue, including three well-reasoned opinions from this Court and intermediate-appellate-court decisions that apply the statutory courthouse-door requirement in a summary-judgment context. The Second Court erred by reversing the trial court's grant of summary judgment.

STATEMENT OF FACTS

In March 2019, Maria Delcarman Sosa-Esparza, who a Wichita County grand jury had indicted with a felony offense, failed to appear at a pretrial conference. C.R. 4, 7, 1 Supp. C.R. 25, 58–60. The trial court signed a judgment nisi that provisionally forfeited[2] the $25,000 bond that Sosa-Esparza and her surety, Appellant Maxie D. Green d/b/a A to Z Bail Bonds, had executed a month earlier. C.R. 4, 8, 1 Supp. C.R. 25.

The judgment nisi recited that Sosa-Esparza's name had been "distinctly called at the courtroom door. The Defendant was given reasonable time to appear after her name was called, but she did not appear." C.R. 4. The judgment nisi further stated that the trial court would make the judgment "final unless good cause [was] shown why [Sosa-Esparza] did not appear." C.R. 4. In accordance with the judgment nisi, a clerk signed a certification of call stating that she had called Sosa-Esparza's name "three times loudly and distinctly in compliance with Texas Code of Criminal Procedure Article 22.02. A reasonable time was given after the calls were made for the defendant to appear, but the defendant did not answer or appear." C.R. 6. Appellant (Sosa-Esparza's

[2]"A judgment nisi is a provisional judgment that is not final or absolute, but may become final. Nisi means 'unless,' so a judgment nisi is valid unless a party shows cause why it should be withdrawn." *Safety Nat. Cas. Corp. v. State*, 273 S.W.3d 157, 163 (Tex. Crim. App. 2008).

bondsman) filed an answer[3] generally denying the allegations contained within the judgment nisi. C.R. 10.

The State sought summary judgment to make the provisional bond-forfeiture judgment final. 1 Supp. C.R. 5. As supporting evidence, the State attached the judgment nisi, the bond, and the certification of call, among other documents. 1 Supp. C.R. 6, 15–24. The State also independently relied on deemed admissions[4] that (1) Sosa-Esparza had failed to appear for the pretrial hearing after the trial court had given her reasonable time to do so, and (2) her name had been "distinctly called outside the Wichita County courtroom door . . . on the hearing date." 1 Supp. C.R. 9, 31, 43–44.

Appellant responded to the State's summary-judgment motion. 2 Supp. C.R. 6. In part, he argued that the State's evidence was insufficient to support forfeiture because the State had proved that Sosa-Esparza's name was called at the "courtroom door," while article 22.02 of the Texas Code of Criminal Procedure required the calling of her name at the "courthouse door."[5] 2 Supp. C.R. 10–11. The State replied to Appellant's response and cited cases holding that the calling of a defendant's name at a "courtroom

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[3] *See* Tex. Code Crim. Proc. Ann. art. 22.11.

[4] *See* Tex. R. Civ. P. 198.2(a) (stating, with respect to a request for admissions, that the "responding party must serve a written response on the requesting party within 30 days after service of the request"), 198.2(c) (explaining that if "a response is not timely served, the request is considered admitted without the necessity of a court order").

[5] Tex. Code Crim. Proc. Ann. art. 22.02.

door" substantially complies with article 22.02's "courthouse door" requirement. C.R. 17.

The trial court granted summary judgment and awarded the State $27,466.18 for the forfeited bond, accrued interest, and costs. C.R. 23. Appellant appealed and raised three points. C.R. 28. A panel of the Second Court of Appeals sustained his second point and reversed the trial court's judgment while holding that proof of the calling of a defendant's name at a "courtroom door" is insufficient, in a summary-judgment context, to meet the "courthouse door" requirement of article 22.02.[6]

The State filed a motion for rehearing and a motion for en banc reconsideration, and the Second Court denied those motions. The Honorable Mike Wallach, who was not on the original three-justice panel, voted to grant the State's motion for en banc reconsideration. On the State's petition, this Court granted review.

SUMMARY OF THE ARGUMENT

The Second Court of Appeals erred by drawing a determinative distinction, under article 22.02 of the Texas Code of Criminal Procedure, between the calling of a defendant's name at a "court*room* door" instead of a "court*house* door." The Second Court's opinion conflicts with *every* other Texas appellate decision rendered on the same

[6] *Green*, 2021 WL 5747148, at *4 ("[W]e conclude it is reasonable to infer that the call occurred only at the courtroom door, which might not be in the same location as the courthouse door . . . . Consequently, the State has failed to satisfy its initial burden of demonstrating that no issue of material fact exists on this essential element and, therefore, is not entitled to summary judgment as a matter of law.").

issue. These decisions include three settled and well-reasoned opinions from this Court that all hold that calling a defendant's name at a courtroom door substantially complies with—that is, fully satisfies—article 22.02's "courthouse door" requirement. The decisions opposing the Second Court's holding also include intermediate-appellate-court opinions applying this Court's courtroom-door-substantial-compliance standard in a summary-judgment context. The Second Court erred by reversing the trial court's grant of summary judgment. This Court should reverse the Second Court's judgment.

ARGUMENT

To forfeit an appearance bond under article 22.02 of the Texas Code of Criminal Procedure, the State must establish that an absent defendant's name was called at the "courthouse door."[7] Tex. Code Crim. Proc. Ann. art. 22.02. Under three prior opinions by this Court and under consistent authority from intermediate appellate courts, the calling of a defendant's name at a court*room* door substantially complies with—that is, fully satisfies—the statutory requirement. The courtroom-door-substantial-compliance standard applies equally to an evidentiary hearing in which the State seeks to finalize a provisional judgment nisi and to a summary-judgment proceeding in which the State seeks the same relief through admission of the same evidence.

[7]The State must prove in a bond-forfeiture proceeding that "(1) there was a valid bond; (2) the defendant's name was distinctly called at the courthouse door; and (3) the defendant failed to appear within a reasonable time of that call." *Benson v. State*, 476 S.W.3d 136, 138 (Tex. App.—Austin 2015, pet. ref'd). The Second Court's reversal of the trial court's summary judgment concerns only the second element.

Because calling a defendant's name at a "courtroom door" always constitutes calling her name at the "courthouse door" and because undisputed evidence showed that the defendant's name was called at the courtroom door, the State met its summary-judgment burden. This Court should reverse the Second Court's opinion and judgment that rests on a contrary holding.

I. Upon the forfeiture of an appearance bond, the defendant's name must be called at the "courthouse door."

Under article 22.02, when a defendant fails to appear for a required setting, her appearance bond must be forfeited by the calling of her "name . . . distinctly at the court*house* door." Tex. Code Crim. Proc. Ann. art. 22.02 (emphasis added); *see also id.* art. 22.01 ("When a defendant is bound by bail to appear and fails to appear[,] . . . a forfeiture of his bail and a judicial declaration of such forfeiture shall be taken in the manner provided in Article 22.02 of this Code and entered by such court."). Conclusive summary-judgment evidence shows that the defendant's name was called at the court*room* door and that she did not thereafter appear. Supp. C.R. 15–18, 43. The Second Court's reversal of the trial court's judgment hinges on a conclusion that the calling of a defendant's name at a "court*room* door" as opposed to a "court*house* door" has legal significance in a summary-judgment case. Repeated decisions from this Court and from intermediate appellate courts say otherwise.

II. Three times, this Court has concluded that calling a defendant's name at a "courtroom door" substantially complies with—that is, fully satisfies—the statutory requirement.

"Substantial compliance" with the calling of the defendant's name at the courthouse door satisfies article 22.02. *Deem v. State*, 342 S.W.2d 758, 759 (Tex. Crim. App. 1961). The calling of the defendant's name at the "courtroom door" qualifies as such substantial compliance. *Id.*

In *Deem*, this Court upheld a forfeiture judgment in the face of testimony from a deputy district clerk that he had called "the name of the [defendant] . . . three times *outside the court room door* [and] that he did not know if it was called at the main door of the court house." *Id.* (emphasis added). The judgment nisi had stated that "the name of the principal was called distinctly at the door of the court house." *Id.* That is, the record in *Deem* reflected a possible evidentiary conflict: testimony that the defendant's name had been called at the courtroom door (varying from the explicit statutory standard) and documentary evidence that his name had been called at the courthouse door (matching the standard verbatim). *See id.* On appeal to this Court, the sureties seized on the conflict and insisted that the bond forfeiture was invalid because "the name of the principal was not called distinctly at the court house door." *Id.*

This Court rejected the sureties' argument and upheld the bond forfeiture. *Id.* Notably, in doing so, the Court did not reason that the judgment nisi's courthouse-door recitation outweighed the clerk's courtroom-door testimony or that the judgment nisi cured a deficiency in that testimony. *See id.* That is, the Court did not choose between

conflicting inferences (or defer to the trial court's choice of conflicting inferences) in upholding the judgment. *See id.* If it had, it would not have predicated a holding on "substantial compliance" at all; instead, the Court would have reasoned that the judgment nisi's recitation of courthouse-door calling, outweighing conflicting inferences from the testimony, showed literal compliance with the statute. *See id.*

Rather, the Court stated, "It is concluded that there was a substantial compliance with the requirement that the name of the principal be called distinctly at the court house door." *Id.* That is, the Court held that the potential evidentiary conflict was immaterial given that the calling of the defendant's name at the courtroom door qualified as substantial compliance with the statutory requirement and therefore fully satisfied it.[8] *See id.*

Four years after deciding *Deem*, the Court again concluded that the calling of a defendant's name at a courtroom door meets article 22.02's "courthouse door" requirement and supports forfeiture of her bond. *Bennett v. State*, 394 S.W.2d 804, 807 (Tex. Crim. App. 1965). The Court left no doubt that the calling of the defendant's

[8]Stated another way, for the term "*substantial* compliance" in *Deem* to have any meaning, the Court had to conclude that there was some evidence presented in that case that did not literally comply with the courthouse-door requirement but substantially complied with it and therefore still satisfied it. The only such evidence in that case was the clerk's testimony that the defendant's name was called outside the courtroom door.

name at a courtroom door is not merely rebuttable evidence inferentially supporting the statutory requirement but instead fully satisfies it:

> We overrule appellants' contention that the court erred in rendering final judgment of forfeiture against them because the record shows that the defendant's name was not called at the courthouse door, as required by [the statutory predecessor to article 22.02]. The judgment nisi recites that the defendant's name was distinctly called at the door of the courthouse and that he did not appear. While there is testimony in the record that the trial judge directed the bailiff to go outside in the hallway of the courtroom on the fourth floor of the courthouse and call the defendant's name, there is no showing that the bailiff did not go to the main door of the courthouse on the first floor and call his name. ***Be that as it may****, under the recent decision of this court in Deem, . . . the record shows a substantial compliance with the [statutory requirement], supra, that the name of the principal be called, distinctly, at the courthouse door.*

Id. (emphasis added).

That is, in *Bennett*, just as in *Deem*, this Court concluded that any evidentiary conflict between whether the bailiff had called the defendant's name at the courthouse door or only the fourth-floor courtroom door was inconsequential. *See id.* "*Be that* [conflict] *as it may*," said this Court, the calling of the defendant's name at the courtroom door constituted substantial compliance with the statutory requirement and supported forfeiture. *See id.* (emphasis added).

Ten years after deciding *Bennett*, this Court interpreted its own precedent and explained that *Bennett* meant what it had said: "[*Bennett*] stands for the proposition that the calling of the principal's name outside in the hallway on the fourth floor of the courthouse is in substantial compliance with the requirement in [article 22.02] . . . that

the name be 'called distinctly at the courthouse door'." *Tocher v. State*, 517 S.W.2d 299, 300 (Tex. Crim. App. 1975).

In sum, the consistent twin holdings of this Court concerning article 22.02's "courthouse door" requirement could not be clearer: (1) "substantial compliance" fully satisfies the requirement, and (2) calling the defendant's name at the "courtroom door" qualifies as "substantial compliance." *Tocher*, 517 S.W.2d at 300; *Bennett*, 394 S.W.2d at 807; *Deem*, 342 S.W.2d at 759.[9]

III. The twin holdings of this Court's three prior opinions—substantial compliance fully satisfies article 22.02, and calling the defendant's name at the courtroom door is substantial compliance—are correct and sensible. This Court has no reason to depart from them.

The twin holdings recited in *Deem*, *Bennett*, and *Tocher* have remained settled in Texas law for over sixty years. While *stare decisis* is not an "inexorable command," this Court should "not frivolously overrule established precedent." *Ex parte Thomas*, 623 S.W.3d 370, 381 (Tex. Crim. App. 2021). The doctrine of *stare decisis* promotes judicial efficiency and consistency, encourages reliance on judicial decisions, and contributes to the integrity of the judicial process. *Garcia v. State*, 614 S.W.3d 749, 754 (Tex. Crim. App.

[9]These same standards apply in criminal cases. *See Walker v. State*, No. 01-98-00827-CR, 1999 WL 1240921, at *2 (Tex. App.—Houston [1st Dist.] Dec. 23, 1999, pet. ref'd) (not designated for publication) (affirming a bail-jumping conviction partially based on evidence that the defendant's name had been called three times at a courtroom door with no response).

2019). Thus, there is a "strong presumption in favor of established law," and this is particularly so when precedent has produced just results. *Thomas*, 623 S.W.3d at 381.

Such is the case here. The twin holdings recited above are correct and sensible, and they have produced just results. *See id.* Indeed, they avoid an absurd result that would otherwise arise from strict and literal adherence to, rather than substantial compliance with, article 22.02's "courthouse door" requirement. *See Roland v. State*, 631 S.W.3d 125, 128 (Tex. Crim. App. 2021) ("We must give effect to the literal text of the statute *unless* the text is ambiguous or the plain meaning of the text would lead to absurd results that the legislature could not have possibly intended." (emphasis added)); *see also* Tex. Gov't Code Ann. § 311.021(3) (expressing a presumption that in enacting a statute, the legislature intends a "just and reasonable result"). Article 22.02's obvious and apparent purposes[10] are to (1) ensure that a defendant has a fair opportunity to appear

[10]A requirement's purpose governs its application. In *Howard v. Fulton*, the Texas Supreme Court considered whether the posting of a notice within an interior courthouse corridor met a "courthouse door" requirement contained within the notice of sale. 14 S.W. 1061, 1062 (Tex. 1891). In holding that the corridor posting was sufficient, the court considered the pragmatic purpose of the posting requirement and reasoned, "In providing for the posting at the court-house door in the deed of trust under consideration, the parties doubtless intended that the notice should be stuck up at the place for posting legal notices in the city of Austin, *such being the place where a poster would most likely be seen by persons desirous of purchasing land at public sale*." *Id.* (emphasis added); *see also Matson v. Fed. Farm Mortg. Corp.*, 151 S.W.2d 636, 640 (Tex. Civ. App.—Waco 1941, no writ) (considering the purpose—providing notice—of a courthouse-door requirement in a civil statute).

Similarly here, calling a defendant's name at the door of the very courtroom where she has been ordered to appear is the most likely means of fulfilling article 22.02's purpose. Like the posting of a notice at the place where it was "most likely to be seen"

for his setting before the forfeiture of his bond, and (2) ensure that the bond is not forfeited absent good cause. *See* Tex. Code Crim. Proc. Ann. art. 22.02. The calling of his name at the door of the very court where his appearance is required—that is, the place of his hearing or his trial—no doubt serves those purposes much better than the calling of his name at one of any number of exterior courthouse doors that are a long walk or an elevator ride away from where he was required to appear. The concurring opinion in the court of appeals recognized as much:

> At first glance, [the majority's reversal of the trial court's summary judgment] appears captious, putting form over function. After all, courthouse structure is vastly different now than at the inception of the bond-forfeiture statutes over 100 years ago.[11] In a modern courthouse, calling a principal's name at the courtroom door where she was specifically cited to appear would seem more efficacious than traversing multiple floors to do so at the door to the entire courthouse.[12]

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satisfied a courthouse-door requirement, the calling of a defendant's name at the place where it is most likely to be heard satisfies a similar requirement.

[11]Although the courthouse-door requirement now exists in article 22.02, enacted in 1965, that requirement has consistently existed through predecessor statutes or judicial decisions since at least 1873. *See Odiorne v. State*, 37 Tex. 122, 123 (1873); *see also Gen. Bonding & Cas. Ins. Co. v. State*, 165 S.W. 615, 619 (Tex. Crim. App. 1913) (citing a predecessor statute that contained the courthouse-door requirement). And since 1939, this Court has recognized that "substantial compliance" with the requirement suffices to support bond forfeiture. *Caldwell v. State*, 126 S.W.2d 654, 655 (Tex. Crim. App. 1939) (citing the Texas Supreme Court's *Howard* case discussed above with approval and upholding forfeiture when on the trial to make the provisional judgment nisi final, the evidence showed that a deputy sheriff had called the defendant's name at a cigar stand twelve feet away from the outer door of the courthouse).

[12]A small rural county might have one "door to the entire courthouse," but an urban county, with a multi-floor courthouse containing numerous district and county courts, is more likely to have many exterior, ground-level courthouse doors. It is not difficult to conceive, therefore, that requiring strict and literal adherence to article

Green, 2021 WL 5747148, at *6 (Walker, J., concurring) (citations omitted).

Article 22.02's principal purpose is ensuring that the defendant has notice before the forfeiture of his bond. Calling his name at the courtroom door ensures he does. This Court's prior opinions that apply the substantial-compliance standard to courtroom-door calling are sensible and correct.

IV. Every Texas intermediate appellate court, including the Second Court in a prior opinion, has applied the courthouse-door requirement through the same twin holdings.

As demonstrated above, the Second Court's opinion in this case conflicts with repeated, longstanding, sensible, and correct decisions by this Court. The opinion also conflicts with decisions *of every other Texas appellate court* that has considered the issue of whether calling a defendant's name at a "courtroom door" substantially complies with, and therefore satisfies, article 22.02's "courthouse door" requirement. *Lara v. State*, No. 11-18-00286-CR, 2020 WL 6373241, at *3 (Tex. App.—Eastland Oct. 30, 2020, pet. ref'd) (mem. op.) ("We . . . note that the trial court's instruction to the sheriff to call Appellant's name in the hallway [outside the courtroom] complied with the requirements of the Code of Criminal Procedure for forfeiting a defendant's bond."); *Quintero v. State*, No. 14-96-00587-CR, 1998 WL 104960, at *2 (Tex. App.—Houston [14th Dist.] Mar. 12, 1998, pet. dism'd w.o.j.) (not designated for publication) ("[I]t . . .

22.02's courthouse door requirement is much less likely to satisfy the purposes of the statute: notice and a fair opportunity to appear.

has been repeatedly held that calling for a defendant from the hallway outside the courtroom where the proceedings are to take place constitutes substantial compliance with article 22.02. Thus, [the bailiff's] actions in calling for Hernandez from the hallway outside the courtroom satisfied the requirements that Hernandez was called from the "courthouse door." (citations omitted));[13] *Aspilla v. State*, 952 S.W.2d 610, 612–13 (Tex. App.—Houston [14th Dist.] 1997, no pet.) ("[T]he Court of Criminal Appeals has held that only substantial compliance with article 22.02 is required. This Court has followed suit, holding that when the State puts on evidence of substantial compliance with Article 22.02 by showing that the defendant's name was called in the hallway outside the courtroom door, *proof that the principal's name was not called at the courthouse door does not defeat the State's showing of substantial compliance*." (emphasis added)).

The Second Court's opinion in this case likewise conflicts with that court's own precedent. In *Guiles v. State*, as summary-judgment proof, the State had attached "affidavits from the two bailiffs that were assigned to the trial court[,] . . . and both attested that [the defendant's] name was called three times outside the courtroom door." No. 02-09-00146-CV, 2010 WL 851421, at *2 (Tex. App.—Fort Worth Mar. 11, 2010, no pet.) (mem. op.). The State had also submitted, as summary-judgment evidence, a judgment nisi stating that the defendant's name had been called from a

[13] *Quintero* was a summary-judgment appeal. 1998 WL 104960, at *1. As explained below, this Court's twin holdings apply equally in a summary-judgment context.

hallway outside the courtroom. *Id.* at *3. In upholding the trial court's grant of summary judgment, the Second Court stated that "calling [the] defendant's name from [a] hallway outside the courtroom where the proceedings are to take place—*as occurred here according to recitations in the judgment nisi*—constituted substantial compliance with article 22.02." *Id.* at *3 (emphasis added) (citing *Bennett*, 384 S.W.2d at 807). That is, in *Guiles*, the Second Court held that the calling of the defendant's name from the courtroom's hallway "conclusively established every necessary element of the bond forfeiture proceeding" and warranted summary judgment. *Id.* at *4.

Guiles is materially indistinguishable from this case because in both cases, the State's (the summary-judgment movant's) own proof established that the defendant's name was called at the courtroom door. *Guiles* held that such proof "conclusively established" the State's entitlement to summary judgment; the panel in this appeal held that such proof "creates doubt" and defeats the State's entitlement to summary judgment. *Compare Green*, 2021 WL 5747148, at *4, *with Guiles*, 2010 WL 851421, at *3–4.

The Second Court's opinion in this case irreconcilably conflicts with that court's opinion in *Guiles*. Much more importantly, it conflicts with the clear and consistent decisions rendered by this Court that are cited above.

V. The summary-judgment posture of this case has no effect on the application of these twin holdings. The Second Court erred by confusing and misapplying the two burdens of a summary-judgment movant.

The twin holdings developed in *Deem*, *Bennett*, and *Tocher* arose from trials. That is, those cases arose from litigation to make the provisional judgment nisi final through evidence presented in a courtroom. The principles developed within those cases apply equally to a summary-judgment proceeding in which the State seeks the *very same relief* while relying on the *very same evidence*.[14]

In reversing the trial court's summary judgment, the Second Court acknowledged repeated holdings "that calling a defendant's name at the courtroom door substantially complies with the directive to call the name at the courthouse door." *Green*, 2021 WL 5747148, at *4. The Second Court stated, however, that those prior cases "were almost exclusively decided at trial on the merits rather than at the summary judgment stage." *Id.* The Second Court then reasoned, "Because the State's evidence wholly fails to

[14]A bond-forfeiture trial typically lasts mere minutes because it does not depend on live testimony; rather the State meets its burden to support forfeiture by introducing certified copies of the bond and of the judgment nisi, the same documents that the State relied on in seeking summary judgment in this case. *See Alvarez v. State*, 861 S.W.2d 878, 880–81 (Tex. Crim. App. 1992). Once the trial court admits those documents, the burden shifts to the surety to show one of five reasons why the principal did not appear, and if the surety does not, the provisional judgment must be made final. *See Nunez v. State*, No. 03-16-00544-CV, 2017 WL 3585217, at *1 (Tex. App.—Austin Aug. 18, 2017, no pet.) (mem. op.); *see also* Tex. Code Crim. Proc. Ann. arts. 26.13 (listing five causes, and "no other," that will exonerate the defendant and his sureties), 26.14 ("When, upon a trial of the issues presented, no sufficient cause is shown for the failure of the principal to appear, the judgment shall be made final.").

address whether Sosa's name was called at the courthouse door, and because we are precluded from inferring facts in the State's favor, the summary judgment evidence creates doubt about where Sosa's name was called. We must resolve these doubts in Green's favor." *Id.*

The Second Court's analysis confused and misapplied the two burdens of a summary-judgment movant. In a civil case,[15] a party is entitled to summary judgment when (1) there is no genuine issue as to any material fact, and (2) the moving party is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c). That is, a party seeking summary judgment has evidentiary burdens that concern *quantum* and *character*. *See id.* As to *quantum*, the movant must show that there is no genuine factual dispute, that is, that the evidence conclusively proves some fact. *See id.*; *see also Zavala v. Franco*, 622 S.W.3d 612, 618 (Tex. App.—El Paso 2021, pet. denied) ("In order to be entitled to a summary judgment, the moving party must conclusively establish that there are no genuine issues of material fact to be decided."). As to *character*, the movant must show that the conclusively-proven fact entitles the movant to relief under the correct legal standard, that is, the movant must prove that the conclusively-proven fact warrants judgment as a matter of law. *See* Tex. R. Civ. P. 166a(c).

[15]Bond-forfeiture proceedings are criminal cases reviewed under civil rules. *See* Tex. Code Crim. Proc. Ann. art. 44.44; *McCarter v. State*, 442 S.W.3d 655, 658 (Tex. App.—El Paso 2014, no pet.).

Perhaps a sports analogy will be helpful. The quantum requirement of summary judgment requires the movant to win in a shutout (by meeting a no-genuine-issue-of-material-fact burden) while the same party could later win at trial in a tightly-contested contest (by meeting a preponderance burden). The character requirement, on the other hand, requires the movant to show that he won the shutout while playing the correct game.

The application of these principles establishes the State's entitlement to summary judgment. As to quantum, the State proved (through the judgment nisi and independently through deemed admissions) that there was no genuine issue of material fact as to the calling of the defendant's name at the courtroom door, and Appellant presented no contrary evidence. As to character, the State showed that the conclusively-proven fact of courtroom calling entitled it to relief under the correct legal standard—substantial compliance of article 22.02's courthouse-door requirement—established by this Court's longstanding and well-reasoned opinions. *See Tocher*, 517 S.W.2d at 300; *Bennett*, 394 S.W.2d at 807; *Deem*, 342 S.W.2d at 759. The State was playing the correct game, and it won in a shutout.

Stated differently, under the rationale articulated in this Court's triad of cases interpreting article 22.02 (*Deem*, *Bennett*, and *Tocher*) and in every other case cited above, if this case were to proceed to trial and if the State were to prove (through admission of the same judgment nisi that the State submitted as summary-judgment evidence) that it called the defendant's name only at the courtroom door and not at the literal

courthouse door, the State would still be entitled to forfeiture because the proof would show substantial compliance with the statutory requirement. *See Tocher*, 517 S.W.2d at 300; *Bennett*, 394 S.W.2d at 807; *Deem*, 342 S.W.2d at 759; *Aspilla*, 952 S.W.2d at 613 (explaining that "proof that the principal's name was not called at the courthouse door does not defeat the State's showing of substantial compliance" when the State shows the name was called at the courtroom door).

That is, proof of the calling of a name at a courtroom door does not "create doubt" on the statutory requirement, as reasoned by the Second Court, but instead affirmatively satisfies it by showing substantial compliance, the standard repeatedly articulated by this Court. *See Tocher*, 517 S.W.2d at 300; *Bennett*, 394 S.W.2d at 807; *Deem*, 342 S.W.2d at 759. That being so, undisputed evidence of the calling of the defendant's name at the courtroom door—the state of the record in this appeal—fully supports summary judgment. *See* Tex. R. Civ. P. 166a(c).

Nothing within this Court's precedent indicates that reviewing courts should apply a different standard of "substantial compliance" depending on whether the appeal arises from a summary-judgment proceeding or a trial on the merits. To the contrary, applying "substantial compliance" differently in a summary-judgment proceeding under a theory that a judgment nisi's recitation of courtroom-door calling is insufficient because it does not also affirmatively show courthouse-door calling would render the

"substantial compliance" standard meaningless.[16] *See Burns v. State*, 814 S.W.2d 768, 772 (Tex. App.—Houston [14th Dist.] 1991) ("We hold that where the State puts on evidence of substantial compliance by showing that the principal's name was called in the hallway outside the courtroom door, proof that the principal's name was not called at the courthouse door does not defeat the State's showing of substantial compliance. To hold otherwise . . . would render the term 'substantial compliance' meaningless."), *rev'd sub nom. on other grounds by Alvarez v. State*, 861 S.W.2d 878 (Tex. Crim. App. 1992).

In sum, the State was entitled to summary judgment because (1) substantial compliance with article 22.02's "courthouse door" requirement is the singular legal standard that applies to trials and summary-judgment proceedings; (2) calling a defendant's name at a "courtroom door" qualifies as substantial compliance; and (3) the record conclusively shows that the defendant's name was called at the courtroom door. Unchallenged courtroom-door evidence meets the applicable substantial-compliance standard, so the Second Court erred by reversing the grant of summary judgment.

[16]That is, there is no rational basis to conclude that a judgment nisi's recitation of courtroom-door calling is sufficient to support forfeiture in a trial but insufficient in a summary-judgment proceeding.

CONCLUSION AND PRAYER

The Second Court's opinion conflicts with *every* Texas appellate decision—including three well-reasoned and longstanding decisions by this Court—that has considered whether calling a defendant's name at a "courtroom door" satisfies the statutory requirement of calling her name at the "courthouse door." The State was entitled to summary judgment because it conclusively proved substantial compliance with article 22.02's courthouse-door requirement. The State prays for this Court to reverse the Second Court's opinion and judgment.[17]

Respectfully submitted,

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[17]Green raised three points in the Second Court. The Second Court sustained his second point and declined to address his first and third points. *Green*, 2021 WL 5747148, at *1 n.1. For the reasons the State argued in the Second Court, Green's first and third points should be overruled. The State asks this Court to overrule those points (in addition to Green's second point) and to affirm the trial court's summary judgment. Alternatively, the State asks this Court to reverse the Second Court's judgment and to remand this appeal to the Second Court for consideration of Green's remaining points.

CERTIFICATE OF COMPLIANCE

I certify that this document was produced on a computer using Microsoft Word and contains 5,370 words as determined by the software's word-count function, excluding the sections listed in Texas Rule of Appellate Procedure 9.4(i)(1).

/s/ Bryce Perry
Bryce Perry

CERTIFICATE OF SERVICE

I certify that on March 29, 2022, I served, by electronic service, a copy of the State's Brief on Appellant Maxie D. Green d/b/a A to Z Bail Bonds through counsel listed below and on the State Prosecuting Attorney. My e-mail address is Bryce.Perry@co.wichita.tx.us.

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Appendices

Appendix 1 ..... Opinions and Judgment of the Second Court of Appeals

Appendix 2 ..... *Deem v. State*, 342 S.W.2d 758 (Tex. Crim. App. 1961)

Appendix 3 ..... *Bennett v. State*, 394 S.W.2d 804 (Tex. Crim. App. 1965)

Appendix 4 ..... *Tocher v. State*, 517 S.W.2d 299 (Tex. Crim. App. 1975)

Appendix 1

In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth

No. 02-21-00013-CV

MAXIE D. GREEN D/B/A A TO Z BAIL BONDS, Appellant	§	On Appeal from the 30th District Court
	§	of Wichita County (190,340-A)
	§	December 2, 2021
V.	§	Memorandum Opinion by Chief
	§	Justice Sudderth
	§	Concurring Memorandum Opinion
THE STATE OF TEXAS, Appellee		by Justice Walker

JUDGMENT

This court has considered the record on appeal in this case and holds that there was error in the trial court's judgment. It is ordered that the judgment of the trial court is reversed, and the case is remanded to the trial court for further proceedings consistent with this opinion.

It is further ordered that Maxie D. Green d/b/a A to Z Bail Bonds shall pay all costs of this appeal, for which let execution issue.

SECOND DISTRICT COURT OF APPEALS

By /s/ Bonnie Sudderth
Chief Justice Bonnie Sudderth

In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth

No. 02-21-00013-CV

MAXIE D. GREEN D/B/A A TO Z BAIL BONDS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 30th District Court
Wichita County, Texas
Trial Court No. 190,340-A

Before Sudderth, C.J.; Kerr and Walker, JJ.
Memorandum Opinion by Chief Justice Sudderth
Concurring Memorandum Opinion by Justice Walker

MEMORANDUM OPINION

Introduction

After Maria Delcarman Sosa-Esparza was indicted for a felony offense in August 2017, she entered into a bail bond with Appellant Maxie D. Green d/b/a A to Z Bail Bonds as surety, securing Sosa's appearance in the trial court. Sosa was ordered to appear for a pretrial conference on March 1, 2019, but she failed to appear. The trial court entered a judgment nisi, which states that Sosa's name had been called "at the courtroom door." *Cf.* Tex. Code. Crim. Proc. Ann. art. 22.02 (requiring call at the "courthouse door"). Both Green and Sosa were cited to appear and show cause why the forfeiture should not be made final. Green timely answered, but Sosa defaulted and is not a party to this appeal.

The State moved for a traditional summary judgment on the bond forfeiture, and Green responded by arguing that the State's evidence raised issues of fact on the essential elements of its case, namely whether Sosa's name was called at the courthouse door. Green also lodged objections to the State's summary judgment evidence. The trial court granted the State's motion without ruling on Green's objections, and Green appealed, arguing in three points that the State's own evidence raised issues of fact as to (1) whether Green received proper notice of the pretrial hearing; (2) whether Sosa's name was called at the courthouse door; and (3) the proper identification of the defendant. We sustain Green's second point, reverse the

trial court's judgment, and remand the case for further proceedings.[1] *See* Tex. R. App. P. 43.2(d).

Standard of Review

In a summary judgment case, the issue on appeal is whether the movant established that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). We review a summary judgment de novo. *Travelers Ins. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010). We take as true all evidence favorable to the nonmovant, and we indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *20801, Inc. v. Parker*, 249 S.W.3d 392, 399 (Tex. 2008); *Provident Life & Accident Ins. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). The movant's own summary judgment evidence can create an issue of fact. *Keever v. Hall & Northway Advertising, Inc.*, 727 S.W.2d 704, 706 (Tex. App.—Dallas 1987, no pet.); *see Luke v. Unifund CCR Partners*, No. 2-06-444-CV, 2007 WL 2460327, at *4–5 (Tex. App.—Fort Worth Aug. 31, 2007, no pet.) (mem. op.).

In a traditional summary judgment, if the movant fails to establish its entitlement to summary judgment, the burden of proof never shifts to the nonmovant. *Draughon v. Johnson*, 361 S.W.3d 81, 87–88 (Tex. 2021).

[1]Because our holding on Green's second point is dispositive, we need not address points one and three. *See* Tex. R. App. P. 47.1

Applicable Law

Though criminal actions, bond forfeiture cases are reviewed on appeal using the same rules as civil suits. Tex. Code Crim. Proc. Ann. arts. 44.42, 44.44; *Benson v. State*, 476 S.W.3d 136, 138 (Tex. App.—Austin 2015, pet. ref'd). Bond forfeiture proceedings are entirely statutory, and courts strictly construe the statutes governing them. *Hernden v. State*, 865 S.W.2d 521, 523 (Tex. App.—San Antonio 1993, no pet.).

The Code of Criminal Procedure outlines the statutory framework for bond forfeiture proceedings:

> Bail bonds and personal bonds are forfeited in the following manner: The name of the defendant shall be called distinctly at the courthouse door, and if the defendant does not appear within a reasonable time after such call is made, judgment shall be entered that the State of Texas recover of the defendant the amount of money in which he is bound, and of his sureties, if any, the amount of money in which they are respectively bound, which judgment shall state that the same will be made final, unless good cause be shown why the defendant did not appear.

Tex. Code. Crim. Proc. Ann. art. 22.02.

The essential elements of the State's bond forfeiture claim are the bond and judgment nisi. *Alvarez v. State*, 861 S.W.2d 878, 880–81 (Tex. Crim. App. 1992). A judgment nisi is prima facie proof that the statutory elements have been satisfied. *Tocher v. State*, 517 S.W.2d 299, 301 (Tex. Crim. App. 1975) (quoting *Thompson v. State*, 31 Tex. 166, 166 (1868) ("This court will presume that the judgment nisi was taken in accordance with the statutory requirements, unless it affirmatively appears otherwise.")). When moving for summary judgment on a bond forfeiture, the State must conclusively prove three facts: (1) a valid bond; (2) the failure of the defendant

to appear at a criminal hearing at which his presence is required; and (3) the calling of the defendant's name distinctly at the courthouse door. *Alvarez*, 861 S.W.2d at 881, 888; *see* Tex. Code Crim. Proc. Ann. art. 22.02.

Application

Because the judgment nisi states that Sosa's name was called at the court*room* door, as opposed to the court*house* door, Green contends that the State failed to establish that there exist no genuine issues of material fact concerning whether Sosa's name was called at the courthouse door as required by Article 22.02. *See* Tex. Code. Crim. Proc. Ann. art. 22.02. We agree.

The State's Evidence

To prove that Sosa's name was called at the courthouse door, the State proffered three pieces of summary judgment evidence: (1) a certified copy of the judgment nisi stating that Sosa's name "was distinctly called at the courtroom door"; (2) a certified certification of call stating that Sosa's name was called "three times loudly and distinctly in compliance with Texas Code of Criminal Procedure Article 22.02";[2] and (3) two unanswered requests for admission—Request for Admission No.

[2]The certification of call is an unsworn, signed statement from the trial court's administrator, which states in full:

> On March 1, 2019, pursuant to the ORDER of the Court, I called the name of the defendant Maria Sosa, in this case three times loudly and distinctly in compliance with Texas Code of Criminal Procedure Article 22.02. A reasonable time was given after the calls were made for the defendant to appear, but the defendant did not answer or appear and wholly made default.

8 and Request for Admission No. 9—which the State argues were deemed admitted by operation of law.[3] Request for Admission No. 8 asked Green to admit or deny that "Defendant–Principal's name was distinctly called outside the Wichita County courtroom door for a scheduled hearing on the hearing date." Request for Admission No. 9 requested that Green admit or deny that "Defendant–Principal was given reasonable time and did not appear in Court for a scheduled hearing on the hearing date."

Green's Objection Limits Evidentiary Scope

In his response to the State's motion, Green objected to the certification of call as conclusory. Specifically, Green objected to the statement that Sosa's name was called "distinctly in compliance with Texas Code of Criminal Procedure Article 22.02." There is no indication in the record that the court ruled on this objection.

[3]The State's motion and response on appeal are predicated largely on the theory that Green, by operation of law, admitted each element of the State's case by failing to respond to the State's propounded requests for admission. We will consider the admissions in our analysis because Green did not address them with the trial court or on appeal and, thus, preserved no valid complaint relative to them. Tex. R. Civ. P. 166a(c) ("[In summary judgment proceedings], [i]ssues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal."); *see Unifund CCR Partners v. Weaver*, 262 S.W.3d 796, 797–98 (Tex. 2008) (holding that a party waives right to challenge deemed admissions if not properly raised with trial court). *But see Medina v. Zuniga*, 593 S.W.3d 238, 244–46 (Tex. 2019) ("[R]equests for admissions are no method for trying the merits."). The deemed admissions to requests eight and nine, so the State argues, admit all elements required to establish the statutory requisites of Article 22.02.

Typically, to preserve an objection to summary judgment evidence for appellate review, the objecting party must have obtained a ruling from the trial court. Tex. R. App. P. 33.1(a)(2)(A); *see Lenz v. Lenz*, 79 S.W.3d 10, 13 (Tex. 2002). However, objecting to a statement in summary judgment evidence as conclusory asserts a defect of substance rather than form and can be raised for the first time on appeal. *Albright v. Good Samaritan Soc'y–Denton Vill.*, No. 02-16-00090-CV, 2017 WL 1428724, at *2 (Tex. App.—Fort Worth April 20, 2017, no pet.) (mem. op.); *see also Seim v. Allstate Tex. Lloyds*, 551 S.W.3d 161, 166 (Tex. 2018). A statement that is nothing more than a legal conclusion is incompetent summary judgment evidence because it does not provide the underlying facts to support its conclusion. *Brown v. Mesa Distribs. Inc.*, 414 S.W.3d 279, 287 (Tex. App.—Houston [1st Dist.] 2013, no pet.); *see Anderson v. Snider*, 808 S.W.2d 54, 55 (Tex. 1991) (holding statements, "I acted properly . . . and that I have not violated the [DTPA] . . . [and] did not breach my contract," were legally conclusive); *Gail v. Berry*, 343 S.W.3d 520, 523 (Tex. App.—Eastland 2011, pet. denied) (holding statement, "I do not believe that this is a case of mutual mistake," was legally conclusive); *Doherty v. Old Place, Inc.*, 316 S.W.3d 840, 845 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (holding statement, "I claim fee simple title," was legally conclusive); *see also In re S.B.*, No. 02-19-00048-CV, 2019 WL 3334615, at *8 (Tex. App.—Fort Worth July 25, 2019, pet. denied) (mem. op.) (explaining that a conclusory statement is one that does not provide the underlying facts to support the conclusion and that without revealing the conclusion's basis, the statement constitutes

no evidence at all); *Long v. Faris*, No. 02-17-00236-CV, 2018 WL 1192252, at *6 (Tex. App.—Fort Worth Mar. 8, 2018, no pet.) (mem. op.) ("Conclusory evidence is not competent summary judgment proof . . . .").

While the State's certification of call provides some factual basis to support *how* Sosa's name was called ("three times loudly and distinctly"), it fails to provide any factual basis for *where* Sosa's name was called. Simply stating that the call was made in compliance with Article 22.02 is nothing more than legally conclusive on this fact. *See Brown*, 414 S.W.3d at 287. Accordingly, this statement is incompetent evidence to support summary judgment on the fact issue of whether Sosa's name was called at the courthouse door. *See Anderson*, 808 S.W.2d at 55.

The State Did Not Meet Its Initial Burden

Thus, we must determine—based only on the judgment nisi and deemed admissions—whether the State established conclusively that Sosa's name was called at the courthouse door. We conclude that it did not.

Both the judgment nisi and the deemed admissions provide only that Sosa's name was called at the court*room* door.[4] Of course, the fact that Sosa's name was called at the courtroom door does not, in itself, preclude that her name was also called at the courthouse door. However, for purposes of summary judgment, we must take

[4]We do not address here whether the judgment nisi is defective, only whether its statements serve to carry the State's initial summary judgment burden on this element. *See* Tex. Code Crim. Proc. Ann. art. 22.12 (stating that court may not set aside judgment nisi for form defect).

as true all evidence favorable to Green and indulge every reasonable inference and resolve any doubts in his favor. *See 20801, Inc.*, 249 S.W.3d at 399.

The State argues that it carried its burden on this element because calling a defendant's name at the courtroom door presumes substantial compliance with Article 22.02. While it is true that courts have repeatedly held that calling a defendant's name at the courtroom door substantially complies with the directive to call the name at the courthouse door, these cases were almost exclusively decided at trial on the merits rather than at the summary judgment stage.[5] *E.g.*, *Deem v. State*, 342 S.W.2d 758, 758–59 (Tex. Crim. App. 1961); *Caldwell v. State*, 126 S.W.2d 654, 654 (Tex. Crim. App. 1939); *Aspilla v. State*, 952 S.W.2d 610, 611–12 (Tex. App.—Houston [14th Dist] 1997, no pet.); *see also Alvarez*, 861 S.W.2d at 884–86 (Overstreet, J., concurring and dissenting on orig. submission) (collecting cases).

[5]It is also notable that we find no cases deciding the very narrow question raised in this case: Does the State, as summary judgment movant in a bond forfeiture case, bear its initial burden as to whether the defendant's name was called at the courthouse door where the judgment nisi on its face recites only that the defendant's name was called at the courtroom door and the State provides no competent evidence showing otherwise? *See Todd v. State*, No. 14-10-00031-CR, 2011 WL 704337, at *2 (Tex. App.—Houston [14th Dist.] Mar. 1, 2011, pet. ref'd) (mem. op., not designated for publication) (affirming summary judgment where judgment nisi explicitly recited name called at the courthouse door); *Guiles v. State*, No. 2-09-146-CV, 2010 WL 851421, at *2 (Tex. App.—Fort Worth Mar. 11, 2010, no pet.) (mem. op.) (affirming summary judgment where nonmovant's affidavit stated that to his knowledge, name was not called, held conclusory and, thus, failed to raise an issue of fact that defendant's name was called at courthouse door).

Because the State's evidence wholly fails to address whether Sosa's name was called at the courthouse door, and because we are precluded from inferring facts in the State's favor, the summary judgment evidence creates doubt about where Sosa's name was called. We must resolve these doubts in Green's favor. *See 20801, Inc.*, 249 S.W.3d at 399. In doing so, we conclude it is reasonable to infer that the call occurred only at the courtroom door, which might not be in the same location as the court*house* door, as the record is silent on that point. Consequently, the State has failed to satisfy its initial burden of demonstrating that no issue of material fact exists on this essential element and, therefore, is not entitled to summary judgment as a matter of law.

To the extent that one of our sister courts has held to the contrary, we disagree with its analysis. *See Quintero v. State*, No. 14-96-00587-CR, 1998 WL 104960, at *2 (Tex. App.—Houston [14th Dist.] Mar. 12, 1998, pet. dism'd w.o.j.) (not designated for publication). In *Quintero*, our sister court stated, in a summary judgment case, that "it is not required that the defendant be called from the 'courthouse door.' Rather, it has been repeatedly held that calling for a defendant from the hallway outside the courtroom where the proceedings are to take place constitutes substantial compliance with article 22.02." *Id.* The court affirmed summary judgment for the State, holding that a bailiff's affidavit proffered by the nonmovant surety stating that the defendant's name was called at the courtroom door on the second floor of the courthouse "satisfied" Article 22.02. *Id.*

Contrary to *Quintero*, we hold that the distinction between proof at trial and proof at the summary judgment stage is important because the supreme court has instructed us that the presumptions and burdens of proof at trial are "immaterial to the burden that a movant for summary judgment must bear." *Mo.-Kan.-Tex. R.R. v. City of Dallas*, 623 S.W.2d 296, 298 (Tex. 1981). "[A] summary judgment movant may not use a presumption to shift to the non[]movant the burden of raising a fact issue of rebuttal." *Chavez v. Kan. City S. Ry.*, 520 S.W.3d 898, 900 (Tex. 2017).

In essence, the State contends that it is entitled to the presumption of substantial compliance regardless of any genuine issues of material fact that arise on the face of its own evidence. To afford the State this presumption—particularly when we are to strictly construe Article 22.02, *Herndon*, 865 S.W.2d at 523—would inappropriately displace its heightened summary judgment burden with the lesser burden of proof it would bear at trial. *Chavez*, 520 S.W.3d at 900; *see Torres v. Caterpillar, Inc.*, 928 S.W.2d 233, 239 (Tex. App.—San Antonio 1996, pet. denied) (instructing that summary judgment is a "harsh remedy requiring strict construction" because it is an exception to conventional trial proceedings decided on evidence admitted in open court). Therefore, we sustain Green's second and dispositive point.

Conclusion

Having resolved the case in Green's favor on his second point, we reverse the trial court's judgment and remand the case for further proceedings in the trial court.

/s/ Bonnie Sudderth

Bonnie Sudderth
Chief Justice

Delivered: December 2, 2021

In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth

No. 02-21-00013-CV

MAXIE D. GREEN D/B/A A TO Z BAIL BONDS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 30th District Court
Wichita County, Texas
Trial Court No. 190,340-A

Concurring Memorandum Opinion by Justice Walker

CONCURRING MEMORANDUM OPINION

Summary-judgment procedure is precise and distinctive. Once a party moves for a summary judgment, a court must close its regular playbook and proceed under the summary-judgment rule's narrow confines. But this principle is as it should be. After all, a summary judgment stops a case in its tracks before it reaches a fact-finder. In essence, a summary judgment decrees that a dispute has no facts to find and, thus, is not entitled to a fact-finder. Accordingly, and as the majority explains, the standard of review must be carefully followed.

Application of that standard here reveals that the State failed to establish as a matter of law that there was no fact issue on an essential element of its case for forfeiture—the principal's name was "called distinctly at the courthouse door" before the provisional judgment was entered. Tex. Code Crim. Proc. Ann. art. 22.02; *see Safety Nat'l Cas. Corp. v. State*, 273 S.W.3d 157, 163 (Tex. Crim. App. 2008) (describing judgment nisi as a provisional judgment that may later become final). Thus, I agree that the summary judgment must be reversed and that the State's case must be remanded for further proceedings under Chapter 22 of the Code of Criminal Procedure. I write separately in order to stress the nature of bail-forfeiture proceedings and its interaction with civil summary-judgment procedure. *See* Tex. Code Crim. Proc. Ann. art. 22.10 (providing civil-suit rules apply to bond-forfeiture proceedings).

To be entitled to a traditional summary judgment on its affirmative claim for relief, the State had to carry the initial burden to conclusively prove by competent summary-judgment evidence that, as a matter of law, there were no genuine issues of material fact concerning each element of its claim. Tex. R. Civ. P. 166a(a), (c); *JLB Builders, L.L.C. v. Hernandez*, 622 S.W.3d 860, 864 (Tex. 2021); *Nichols v. Smith*, 507 S.W.2d 518, 520 (Tex. 1974); *Gibbs v. Gen. Motors Corp.*, 450 S.W.2d 827, 828 (Tex. 1970). And importantly in this case, we view the evidence in the light most favorable to the surety and resolve any doubts against the motion. *See Eagle Oil & Gas Co. v. TRO-X, L.P.*, 619 S.W.3d 699, 705 (Tex. 2021).

The State's bond-forfeiture cause of action had three elements: (1) a valid bond executed by the surety, (2) the principal's name was called distinctly at the courthouse door, and (3) the principal failed to appear within a reasonable time of that call. *Alvarez v. State*, 861 S.W.2d 878, 887 (Tex. Crim. App. 1992) (op. on reh'g). Our case turns on the second element: Did the State conclusively establish as a matter of law that the principal's name was called distinctly at the courthouse door? As the majority recognizes, the judgment nisi, which is prima facie proof of the statutory elements, reflects that the principal's name was called at the court*room* door. And the deemed admission follows suit, admitting only that the principal's name was called at the court*room* door. *See generally* Tex. R. Civ. P. 198.3 (explaining effect of deemed admission). The State's summary-judgment evidence shows that it did not conclusively establish that the principal's name was called at the court*house* door as

required; thus, the surety was not required to come forward with contradictory evidence on this element of the State's case.[1] *See Swilley*, 488 S.W.2d at 67–68.

At first glance, this result appears captious, putting form over function. After all, courthouse structure is vastly different now than at the inception of the bond-forfeiture statutes over 100 years ago. *See Alvarez*, 861 S.W.2d at 885 n.3 (Overstreet, J., concurring and dissenting on orig. submission); *Gen. Bonding & Cas. Ins. Co. v. State*, 165 S.W. 615, 616, 619 (Tex. Crim. App. 1913); Harold Don Teague, Comment, *The Administration of Bail and Pretrial Freedom in Texas*, 43 Tex. L. Rev. 356, 360 & n.30 (1965). In a modern courthouse, calling a principal's name at the courtroom door where she was specifically cited to appear would seem more efficacious than traversing multiple floors to do so at the door to the entire courthouse. And in some instances, calling the defendant's name in the courtroom is considered sufficient, which could lead to confusion for the bench and bar alike. *See, e.g.*, *Kombudo v. State*, 148 S.W.3d 547, 550 (Tex. App.—Houston [14th Dist.] 2004) (discussing reasonable-excuse defense to bail jumping), *rev'd on other grounds*, 171 S.W.3d 888, 889 (Tex. Crim. App. 2005); *Walker v. State*, No. 01-98-00827-CR, 1999 WL 1240921, at *2 (Tex. App.—Houston [1st Dist.] Dec. 23, 1999, pet. ref'd) (not designated for publication)

[1]Even if the certification of call were considered, it would not change the result here. If the administrator's statement that the call was conducted in compliance with Article 22.02 was sufficient to establish that the principal's name was called at the courthouse door, that statement would be juxtaposed to the judgment nisi and the admission that the call occurred at the courtroom door. Thus, the State would not have established this element as a matter of law. *See, e.g.*, *Swilley v. Hughes*, 488 S.W.2d 64, 67 (Tex. 1972).

(holding evidence legally sufficient to support bail-jumping conviction partially based on evidence that appellant's name had been called three times at courtroom door on appearance date with no response); *Aspilla v. State*, 952 S.W.2d 610, 612–13 (Tex. App.—Houston [14th Dist.] 1997, no pet.) (holding in review of final forfeiture judgment that calling principal's name at the courtroom door was substantially compliant with Article 22.02). But "[u]ntil the Legislature changes it, the statute requires that the principal's name be called at the courthouse door, period." *Alvarez*, 861 S.W.2d at 884; *see also Timmins v. State*, 601 S.W.3d 345, 348 (Tex. Crim. App. 2020) (holding courts "ordinarily give effect to [plain] meaning" when construing statutes). The State did not establish this element as a matter of law, and any inquiry into substantial compliance would prematurely shift the summary-judgment burden away from the State to conclusively establish its statutory cause of action. *See Alvarez*, 861 S.W.2d at 884–85; *cf. Bennett v. State*, 394 S.W.2d 804, 807 (Tex. Crim. App. 1965) (discussing substantial compliance in the context of final forfeiture judgment); *Aspilla*, 952 S.W.2d at 612–13 (same).

With these clarifying comments, I concur in this court's judgment.

/s/Brian Walker

Brian Walker
Justice

Delivered: December 2, 2021

In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth

No. 02-21-00013-CV

MAXIE D. GREEN, D/B/A A TO Z BAIL BONDS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 30th District Court
Wichita County, Texas
Trial Court No. 190,340-A

ORDER

We have considered "State's Motion for En Banc Reconsideration."

It is the opinion of the court that the motion for en banc reconsideration should be and is hereby denied and that the opinion and judgment of December 2, 2021 stand unchanged.

We direct the clerk of this court to send a notice of this order to the attorneys of record.

Signed December 30, 2021.

/s/ Bonnie Sudderth
Bonnie Sudderth
Chief Justice

En Banc

Wallach, J., would grant.

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No. 02-21-00013-CV

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V.

THE STATE OF TEXAS, Appellee

On Appeal from the 30th District Court
Wichita County, Texas
Trial Court No. 190,340-A

ORDER

We have considered "State's Motion for Rehearing."

It is the opinion of the court that the motion for rehearing should be and is hereby denied and that the opinion and judgment of December 2, 2021 stand unchanged.

We direct the clerk of this court to send a notice of this order to the attorneys of record.

Signed December 30, 2021.

/s/ Bonnie Sudderth
Bonnie Sudderth
Chief Justice

Panel: Sudderth, C.J.; Kerr and Walker, JJ.

Appendix 2

170 Tex.Crim. 564
Court of Criminal Appeals of Texas.

Phillip M. DEEM et al., Appellants,
v.
STATE of Texas, Appellee.

No. 32682.
|
Jan. 18, 1961.
|
Rehearing Denied Feb. 15, 1961.

Synopsis

Action for forfeiture of a recognizance on appeal. The Criminal District Court, No. 2, Harris County, Langston G. King, J., entered judgment of forfeiture, and sureties appealed. The Court of Criminal Appeals held that evidence established substantial compliance with requirement that the name of the principal be called distinctly at the courthouse door before a forfeiture of recognizance was made.

Judgment affirmed.

See also 318 S.W.2d 649.

West Headnotes (3)

[1] **Bail** Process and Appearance

Any claim of error for want of proper service in proceedings for forfeiture of a recognizance on appeal became a nullity when sureties appeared in person and by counsel in open court upon call of the cause, and announced ready for trial.

4 Cases that cite this headnote

[2] **Bail** Evidence

Evidence established substantial compliance with requirement that the name of the principal be called distinctly at the courthouse door before a forfeiture of recognizance was made.

5 Cases that cite this headnote

[3] **Bail** Process and Appearance

A surety on a recognizance on appeal was not in a position to complain of service in action for forfeiture of the bond where he had been served in the cause prior to issuance of alias scire facias.

Attorneys and Law Firms

***564** ****758** C. C. Divine, Houston, for appellant.

Dan Walton, Dist. Atty., Walter A. Carr, Asst. Dist. Atty., Houston, Leon B. Douglas, State's Atty., Austin, for the State.

Opinion

BELCHER, Commissioner.

This is an appeal by I. B. Shapiro and W. E. Martin, sureties on a recognizance on appeal of Phillip M. Deem, from the final judgment of Criminal District Court No. 2 of Harris County upon a forfeiture of said recognizance.

Judgment nisi was entered on February 23, 1959 when Phillip M. Deem failed to appear in said court when he was called to abide the judgment of the Court of Criminal Appeals of Texas as conditioned in said recognizance.

The appellant I. B. Shapiro, filed a verified answer and denial in this cause on ****759** October 24, 1959. He also filed another sworn answer and denial May 13, 1960.

Appellant Martin, by written motion sought to quash the citation issued and served on him. There is no showing that such motion was ever presented to or acted upon by the trial court.

The final judgment entered June 17, 1960 reads in part as follows:

***565** 'This day came on for trial the above entitled and numbered cause, wherein the State Of Texas is plaintiff and Phillip M. Deem, I. B. Shapiro, and W. E. Martin are defendants, whereupon came the State Of Texas by her District Attorney, and came said defendants Martin and Shapiro in person and by attorney, Phillip M. Deem appearing not, whereupon all parties announced ready for trial; and it appearing to the court after consideration of the pleadings and the evidence herein, that * * * the judgment nisi heretofore rendered against the * * * said I. B. Shapiro and W. E. Martin

as sureties on the recognizance of the said Phillip M. Deem should be made final.'

[1] Any claim of error for want of proper service became a nullity when the sureties appeared in person and by counsel in open court upon the call of this cause and announced ready for trial. Steen et al. v. State, 27 Tex. 86; 6 Tex.Jur.2d 5, Sec. 3; Industrial Finance Service Co. v. Riley et ux., Tex.Civ.App., 295 S.W.2d 498, 507.

The indictment, the recognizance, the judgment nisi and the mandate of the Court of Criminal Appeals affirming the judgment of the trial court were introduced in evidence and they appear to be regular and valid.

No proof was offered showing that the principal had good cause for not appearing and attending the court as he had bound himself to do in the recognizance. Neither did the sureties bring themselves within any of the statutory provisions which would exonerate them or under which a forfeiture could be remitted.

[2] It is insisted that the judgment nisi is invalid because the name of the principal was not called distinctly at the court house door before the forfeiture of the recognizance.

Deputy District Clerk Keegan testified that the name of the principal was called distinctly three times outside the court room door, but that he did not know if it was called at the main door of the court house.

The judgment nisi recites that the name of the principal was called distinctly at the door of the court house.

It is concluded that there was a substantial compliance with the requirement that the name of the principal be called distinctly at the court house door. Caldwell et al. v. State, 136 Tex.Cr.R. 524, 126 S.W.2d 654.

***566** The judgment is affirmed.

Opinion approved by the Court.

On Motion for Rehearing.

MORRISON, Judge.

[3] Complaint is again made as to the service on appellant Martin. He is in no position to complain because he had already been served in this cause on May 5, 1959, long prior to the issuance of the alias scire facias.

Remaining convinced that we properly disposed of this cause originally, appellant's motion for rehearing is overruled.

All Citations

170 Tex.Crim. 564, 342 S.W.2d 758

End of Document

Appendix 3

394 S.W.2d 804
Court of Criminal Appeals of Texas.

Thomas H. BENNETT et al., Appellants,

v.

The STATE of Texas, Appellee.

No. 38459.
|
Oct. 27, 1965.

Synopsis

Action for forfeiture of appearance bond. The County Court at Law No. 4, Harris County, Joseph M. Guarino, J., entered judgment of forfeiture, and principal and sureties appealed. The Court of Criminal Appeals, Dice, C., held that appearance bond executed in justice court requiring principal to appear therein to answer misdemeanor charge of driving while intoxicated and to appear in any subsequent proceedings in any county court involving identical charge was sufficient under statute supporting such condition to command principal's subsequent appearance in county criminal court to answer same charge and his failure to appear justified entry of final judgment forfeiting bond.

Affirmed.

West Headnotes (6)

[1] **Bail** Construction and Operation

Appearance bond executed in justice court requiring principal to appear therein to answer misdemeanor charge of driving while intoxicated and to appear in any subsequent proceedings in any county court involving identical charge was sufficient under statute supporting such condition to command principal's subsequent appearance in county criminal court to answer same charge so that no fatal variance existed between bond's condition on justice court appearance and scire facias writ's recital that bond was conditioned on county court appearance. Vernon's Ann.C.C.P. art. 275a.

[2] **Bail** Requisites and Validity in General

Approval of appearance bond by rubber stamp signature of justice of the peace did not vitiate the bond as judge's approval was not necessary to validity of bond taken by him.

1 Cases that cite this headnote

[3] **Bail** Appeal and Error

On appeal by principal and sureties from judgment forfeiting appearance bond because of principal's failure to appear in county criminal court to answer charge of driving while intoxicated, objection to admission of bond in evidence that "the proper predicate has not been laid" was too general to be reviewable.

12 Cases that cite this headnote

[4] **Bail** Evidence

Judgment nisi forfeiting appearance bond was properly admitted in evidence in proceeding for final judgment notwithstanding objection that bond was void because justice court clerk required two bonds in violation of statute providing that second bond could not be required in absence of judge's finding that first bond was insufficient, in view of testimony of justice of peace that he only knew of bond sought to be forfeited and that it was his clerk's policy to accept only one bond. Vernon's Ann.C.C.P. art. 275a, §§ 2, 3.

[5] **Bail** Judgment or Record of Forfeiture

Although judge's signature did not appear on judgment nisi introduced in evidence in proceeding for final judgment forfeiting bail bond, his signature was not necessary to validity of judgment.

[6] **Bail** Evidence

Evidence established substantial compliance with statutory requirement that principal's name be called distinctly at courthouse door

before appearance bond was forfeited. Vernon's Ann.C.C.P. art. 425.

10 Cases that cite this headnote

Attorneys and Law Firms

***805** Shannon L. Morris, Baytown, for appellants.

Frank Briscoe, Dist. Atty., Carl E. F. Dally, Ruben W. Hope, Jr., and Allen D. McAshan, Asst. Dist. Attys., Houston, and Leon B. Douglas, State's Atty., Austin, for the State.

Opinion

DICE, Commissioner.

This is an appeal by Thomas H. Bennett, principal on an appearance bond, and his sureties, John M. Shearer and E. F. Wainscott, from a final judgment of County Criminal Court at Law No. 4 of Harris County, forfeiting said bond.

The bond, dated January 26, 1964, in the penal sum of $500, was entered into in Justice Court, Precinct No. 3, of Harris County.

The bond recites that the principal, Bennett, had been arrested, on a misdemeanor charge of driving while intoxicated, by virtue of a warrant issued by M. M. Brown, Justice of the Peace of Precinct No. 3 of Harris County, Texas, and was conditioned that the defendant would make his appearance before the justice court instanter, 'there to remain in attendance from day to day and term to term, until discharged by due order of the Court, to answer the aforesaid accusation against him and shall personally appear for any and all subsequent proceedings had relative to the above charge before the Grand Jury of said County and before any Court of said County in which said subsequent proceedings may be pending and not depart the Court without leave, of the proper Court, and then in that case the bond will be null and void, otherwise to remain in full force and effect.'

On February 5, 1964, an information and complaint were filed in County Criminal Court at Law No. 4, in Cause No. 187,814, charging the defendant Bennett with the offense of driving while intoxicated, alleged to have been committed on or about the 24th day of January, 1964.

Judgment nisi was entered in the County Criminal Court No. 4 on August 25, 1964, forfeiting the bond upon failure of the principal Bennett to appear and answer when the case was called for trial.

Scire facias was duly issued and served upon the appellant sureties, who, on October 5, 1964, filed their answer thereto.

On February 26, 1965, a non-contested judgment was entered against appellants in the case, which was set aside by the court on March 8, 1965, in an order granting appellants a new trial.

On April 2, 1965, a new trial was held and at the conclusion thereof the court entered judgment against appellants for the full amount of the bond.

From such judgment, appellants prosecute this appeal.

***806** At the trial, the state introduced in evidence, among other instruments, the appearance bond, judgment nisi, and scire facias.

Three objections were made by appellants to the admission in evidence of the appearance bond.

The first objection was, in substance, that there was a fatal variance between the bond and the scire facias because the bond was conditioned that the defendant Bennett appear instanter before the justice of the peace of Precinct No. 3 of Harris County at a special term to be held in and for Harris County at the courthouse in Baytown, whereas the scire facias recited that the bond was conditioned that the defendant would make his personal appearance before the Criminal Court at Law No. 4 of Harris County, instanter, at the term of said court then in session at the courthouse in the city of Houston.

The question of whether there was a fatal variance must be determined in light of the provisions of Art. 275a, Vernon's Ann.C.C.P., enacted by the 55th Legislature in 1957

Art. 275a, supra, reads, in part:
'Section 1. Where a defendant, in the course of a criminal action, gives a bail bond or enters into a recognizance before any court or person authorized by law to take same, for his personal appearance before a court or magistrate, to answer a charge against him, the said bond or recognizance shall be valid and binding upon the defendant and his sureties thereon, for the defendant's personal appearance before the court or magistrate designated therein, and for any and all subsequent proceedings had relative to the charge, and each such bail bond or recognizance shall be so conditioned except as hereinafter provided.'

In Picaroni v. State, Tex.Civ.App., 364 S.W.2d 240, cited and relied upon by appellants, this court did not pass upon the question of whether the above statutory provisions may be read into a bail bond, because in that case there was no showing that the indictment returned against the accused in district court was for the same offense charged against him in the justice court for which he had made bond.

Later, in Hartley, et al., v. State, Tex.Cr.App., 382 S.W.2d 483, this court gave application to the provisions of Art. 275a, supra, in holding that an appearance bond executed in a justice court requiring that the principal appear in said court to answer the charge and to also appear for any and all subsequent proceedings had relative thereto in any court, was sufficient to command his appearance before a county court at law to answer a charge subsequently presented against him by a complaint and information charging the identical offense.

[1] The proof in the present case shows that the offense charged against the defendant Bennett in both the justice court and the county court was that of driving while intoxicated. The same county court number (187,814) and justice court number (51,391) appear on both the appearance bond, executed by appellants in the justice court, and the information filed against the defendant in the county court. This is sufficient to show the offense charged against the defendant in the county court was the same as that charged in the justice court.

Under the record and the provisions of Art. 275a, supra, the condition in the bond executed by appellants in the justice court was sufficient to command the defendant's appearance in the subsequent proceedings in the county criminal court, and no fatal variance exists.

[2] Appellants' second objection to admitting the bond in evidence was on the ground that it appeared to have been approved, by the judge's signature being placed thereon by a rubber stamp.

***807** This would not vitiate the bond, as the approval of a justice of the peace is not necessary to the validity of a bond taken by him. In 8 Tex.Jur.2d 173, Sec. 47, it is stated that approval may be inferred from his return of the bond to the court to which it is directed. Dyches v. State, 24 Tex. 266.

[3] Appellants' third objection to the bond was on the ground that 'the proper predicate has not been laid.' Such objection was too general to merit consideration. See: 56 Tex.Jur.2d 516, Sec. 171, and cases there cited.

[4] Complaint is made to the introduction in evidence of the judgment nisi over appellants' objection that it was predicated upon a void bond, under the provisions of Art. 275a, supra.

At the trial, counsel for appellants testified that before the defendant Bennett was released on bail he was required by a clerk of the justice court to execute two bonds. He stated that the first bond was executed and approved for the amount of $400. Prior to releasing the defendant, a new bond in the amount of $500 was required and the bond in question ($500) was executed and approved. It is appellants' contention that the clerk had no authority to require the second bond in view of Secs. 2 and 3 of Art. 275a, supra, which provide, in substance, that once a bail bond is given by a defendant he shall not be required to give another bond except when the judge or magistrate in whose court the action is pending shall find the bond insufficient and require another bond in an amount which he may deem proper.

Justice of the Peace Brown, in whose court the bond was executed, testified that he knew of no bond except the one sought to be forfeited. He further testified that in his court he had set up a schedule which provided for a bond of $400 for one charged with the misdemeanor offense of drunken driving and $500 where the person was charged with or suspected of having committed the felony offense of drunken driving. He further stated that such schedule was followed by his clerks and on occasions the amounts would be changed but only one bond accepted. Under the record, the contention is overruled.

[5] The contention is also urged that the court erred in admitting the judgment nisi in evidence because it did not bear the signature of the trial judge.

While appellants made no such objection to the judgment when offered, we observe that although the judge's signature did not appear on the judgment introduced in evidence from the minutes of the court, his signature was not necessary to the validity of the judgment. McGowen v. State, 163 Tex.Cr.R. 587, 290 S.W.2d 521.

[6] We overrule appellants' contention that the court erred in rendering final judgment of forfeiture against them because the record shows that the defendant's name was not called at the courthouse door, as required by Art. 425, V.A.C.C.P. The judgment nisi recites that the defendant's name was distinctly called at the door of the courthouse and that he did not

appear. While there is testimony in the record that the trial judge directed the bailiff to go outside in the hallway of the courtroom on the fourth floor of the courthouse and call the defendant's name, there is no showing that the bailiff did not go to the main door of the courthouse on the first floor and call his name. Be that as it may, under the recent decision of this court in Deem, et al., v. State, 170 Tex.Cr.R. 564, 342 S.W.2d 758, the record shows a substantial compliance with the requirement of Art. 425, supra, that the name of the principal be called, distinctly, at the courthouse door.

No reversible error appearing, the judgment is affirmed.

Opinion approved by the Court.

All Citations

394 S.W.2d 804

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Appendix 4

517 S.W.2d 299
Court of Criminal Appeals of Texas.

Zuzanne TOCHER et al., Appellants,

v.

The STATE of Texas, Appellee.

No. 49179.
|
Jan. 8, 1975.

Synopsis
Sureties on a criminal appeal bond appealed from a final judgment of forfeiture entered by the 34th Judicial District Court, El Paso County, Jerry Woodard, J., after the principal failed to appear to be remanded into custody. The Court of Criminal Appeals, Roberts, J., held that the forfeiture was not invalid simply because there was no affirmative showing that the principal's name was distinctly called at the courthouse door.

Affirmed.

West Headnotes (3)

[1] **Bail** Proceedings for Fixing Liability or Forfeiture

State's case in bond forfeiture proceeding consists of bond and judicial declaration of forfeiture of bond, which is judgment nisi; once this has been established, defendant must then prove that required element of forfeiture has not been complied with. Vernon's Ann.C.C.P. art. 22.02.

33 Cases that cite this headnote

[2] **Bail** Proceedings for Fixing Liability or Forfeiture

Fact that it was not noted on docket sheet that principal's name was called was not affirmative proof that principal was not thus called. Vernon's Ann.C.C.P. art. 22.02.

4 Cases that cite this headnote

[3] **Bail** Proceedings for Fixing Liability or Forfeiture

Where, in bail forfeiture proceedings, bailiff merely testified that he, personally, did not remember having called principal's name and did not know if it was done, but he also indicated that another person often performed that duty and could have done so in case at bar, and sureties nonetheless did not call such other person to testify, sureties' evidence did not affirmatively show that principal's name was not called and sureties therefore did not discharge burden of showing that fact so as to overcome presumption that recitation of requirement in judgment nisi was in accordance with statute. Vernon's Ann.C.C.P. art. 22.02.

25 Cases that cite this headnote

Attorneys and Law Firms

***299** Anthony C. Aguillar and Bluford B. Sanders, Jr., El Paso, for appellants.

Steve W. Simmons, Dist. Atty. and Anita Ashton, Asst. Dist. Atty., El Paso, Jim D. Vollers, State's Atty., Austin, for the State.

OPINION

ROBERTS, Judge.

This is an appeal by Victor Apodaca, Jr. and T. A. Merrill, sureties on an appeal bond for Zuzanne Tocher, from a final judgment of forfeiture.

On August 26, 1971, the principal and sureties executed a bail bond in the amount of $5,000 for the principal's appearance at trial for the offense of murder with malice. The principal was tried, found guilty of murder without malice, and continued on the original bond pending appeal. Her conviction was affirmed and mandate issued. Tocher v. State, 501 S.W.2d 921 (Tex.Cr.App.1973). The principal was set for an appearance on the mandate of January 23, 1974, to be remanded to

custody. All parties were given proper notice of this setting and the principal failed to appear. a judgment nisi was entered. The bond ***300** forfeiture hearing was held on April 19, 1974 and final judgment was entered june 24, 1974.

At the bond forfeiture hearing, the State introduced into evidence certified copies of the original bond, the docket sheet in this case, the judgment nisi, and the mandate issued by this Court. From the evidence adduced at the hearing, it appears that the last entry on the docket sheet introduced at that time was a May 4, 1972 notation of the principal's appearance with her attorney at which time she was sentenced to two years and six months in the State penitentiary, gave notice of appeal, and was continued on bond. During the hearing, appellants stressed the fact that the docket sheet did not indicate that any proceeding whatsoever was held on January 23, 1974 when the judgment nisi was issued. Appellants emphasized that the docket sheet did not affirmatively reflect that the principal's name was 'called distinctly at the courthouse door . . .'. Julian Castillo, bailiff of the district court which issued the judgment nisi, testified that the customary procedure was for himself or Mr. Tom Neely to go downstairs to the entrance of the courthouse and call out the principal's name three times and if they fail to answer, notation of the time and date is made on the docket sheet. He further testified that he, personally, did not remember having called the principal's name on January 23, 1974 and from his personal knowledge did not know if it was called at all.[1] After a brief recess, the State attempted to reopen the evidence for the purpose of calling Tom Neely to testify. Appellant's objection was sustained and the request was denied.

[1] When attorneys for the appellants received a copy of the statement of facts prepared by the court reporter, they discovered that State's Exhibit No. 2 (the certified copy of the docket sheet) had been altered. An additional entry had been made after its introduction and acceptance by the court as an item of evidence. The new entry read as follows:

'1—23—74—failed to appear on mandate Bond Forfeiture—name called on Court House steps at 1:55 p.m. by Tom D. Neely—Witness V. Korpalski'

There was no indication as to exactly when this entry was in fact made but showed only the date '1—23—74'. It is undisputed that at the hearing in April, where the exhibit was introduced there was no '1—23—74' entry and consequently, it must have been placed on the docket sheet some time subsequent to the hearing in April. An amendment to the Statement of Facts was entered by the trial court on October 8, 1974 wherein the Statement of Facts was corrected to show that State's Exhibit No. 2 (the certified copy of the docket sheet) did not contain an entry for January 23, 1974. Therefore, the entry on the docket sheet dated '1—23—74' is not properly before us and will not be considered.

Although there is serious question as to the propriety of the docket sheet being altered after the hearing was held, it is not necessary to the disposition of this case and we need not address ourselves to that issue.

Appellants' sole ground of error complains that Art. 22.02, Vernon's Ann.C.C.P., was not strictly complied with in taking the bond forfeiture, inasmuch as the principal's name was not distinctly called at the courthouse door. It is maintained that there is no evidence to show any compliance with this requirement. Appellants rely on Bennett v. State, 394 S.W.2d 804 (Tex.Cr.App.1965). We find that appellants' reliance is misplaced for Bennett v. State, supra, stands for the proposition that the calling of the principal's name outside in the hallway on the fourth floor of the courthouse is in substantial compliance with the requirement in Art. 22.02, V.A.C.C.P., that the name be 'called distinctly at the courthouse door'. In the case at bar, there is no contention that the name was called at a place other than the courthouse door, but that the name was not called at all. Therefore, substantial compliance is not an issue in the instant case.

[1] Furthermore, the record reflects that the judgment nisi was admitted into evidence. It recites that the principal, Zuzanne Tocher, failed to appear and that her name was called distinctly at the door of the courthouse. In Thompson v. State, 31 Tex. 166 (1868), this precise issue was decided. There, it was complained that the record did not show that the sureties upon the bail were called at the courthouse door ***301** before the rendition of the judgment nisi as required by statute. It was held:

'This court will presume that the judgment nisi was taken in accordance with the statutory requirements, unless it affirmatively appear otherwise.'

A judgment nisi is prima facie proof that the statutory requirements have been satisfied and the burden is on the defendant to affirmatively show otherwise. It is well settled that the State's case in a bond forfeiture proceeding consists of the bond and the judicial declaration of the forfeiture of the bond, which is the judgment nisi. General Bonding & Casualty Ins. Co. v. State, 73 Tex.Cr.R. 649, 165 S.W.2d 615 (1913). Once this has been established, the defendant must then prove that one of the elements has not been complied with.

[2] **[3]** In the instant case, there has been no affirmative showing that the principal's name was not called.[2] Appellants called the bailiff of the court which rendered the judgment nisi to the stand. Mr. Castillo merely testified that he, personally, did not remember having called the principal's name and did not know if it was done. He did indicate, however, that Tom Neely often performed this duty and could have done so in this case. Even though appellants were cognizant of this, they still did not call Neely to testify. We cannot hold that this evidence alone affirmatively shows that the name was not called. At most, the evidence shows that one of two persons who were customarily responsible for this duty did not perform it. There is absolutely no showing that Neely did not call the principal's name. The appellants have not overcome the presumption that the recitation of the requirement in the judgment nisi is in accordance with the statute. Appellants' ground of error is overruled.

2 Art. 22.02, V.A.C.C.P., does not require a notation that the principal's name was called to be placed on the docket sheet in a bond forfeiture proceeding. The fact that such is not noted on the docket sheet is not proof that it was not done. There must be some affirmative proof which indicates that the requisite was not performed as stated in the judgment nisi.

The judgment is affirmed.

All Citations

517 S.W.2d 299

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Associated Case Party: Maxie D. Green d/b/a A to Z Bail Bonds

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